IN THE
Supreme Court of the United States
October Term, 1979

No. 78-5471

THOMAS W. WHALEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR PETITIONER

SILAS J. WASSERSTROM
WILLIAM J. MERTENS
W. GARY KOHLMAN
Public Defender Service for the District of Columbia
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-5471

THOMAS W. WHALEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals affirming the petitioner's conviction is reported at 379 A.2d 1152 (1977). A copy of that opinion appears as Appendix A to the Petition for a Writ of Certiorari. The separate Order of that Court denying Mr. Whalen's Petition for Rehearing is reported at 388 A.2d 894 (1978). A copy of the Order appears as Appendix B to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered on November 19, 1977. A timely Petition for Rehearing was denied on July 14, 1978. The Petition for Writ of Certiorari was filed on September 25, 1978. Certiorari was granted on April 16, 1979. On May 21, 1979, the Clerk extended the time for filing petitioner's brief until June 30, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether consecutive sentences can be imposed for felony-murder (rape) (22 D.C. Code §2401, 22 D.C. Code §2404) and the same rape charged and proved as the predicate for the felony-murder.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.* * *

22 D.C. Code 2401 provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

22 D.C. Code 2404 provides in pertinent part:

> * * * Notwithstanding any other provision of law, a person convicted of first degree murder upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.* * *

STATEMENT OF THE CASE

The petitioner was tried by a jury in the District of Columbia Superior Court on a seven-count indictment. The evidence at trial—the sufficiency of which is not at issue here—showed that all of these charges grew out of a single incident which occurred on the morning of September 10, 1972.

On January 16, 1974, he was convicted on two counts of felony-murder (with rape and burglary as the underlying felonies), in violation of 22 D.C. Code 2401; second-degree murder, in violation of 22 D.C. Code 2493; rape, in violation of 22 D.C. Code 2801; and first-degree burglary, in violation of 22 D.C. Code 1801(a). On March 4, 1974, he was sentenced to concurrent terms of 20 years to life imprisonment on each felony-murder count and 15 years to life imprisonment for second-degree murder, and to consecutive terms of 15 years to life imprisonment for rape and 10 to 30 years imprisonment for first-degree burglary.

On appeal to the District of Columbia Court of Appeals, that Court reversed the convictions for first-degree burglary and for felony-murder in the perpetration of burglary becuase, it held, the indictment had been improperly amended. It affirmed the convictions and consecutive sentences for rape and for felony-murder in the perpetration of the rape, holding that, because the underlying felony is an "intent-divining mechanism" in the the felony murder prosecution, and because the rape and felony murder statutes were meant to protect different "societal interests," cumulative punishment could be imposed. The court vacated the sentence for second degree murder after finding that it was a "lesser included offense of felony murder". On April 16, 1979, this Court granted the Petition for a Writ of Certiorari challenging the permissibility of this cumulative punishment.

SUMMARY OF THE ARGUMENT

Where one offense is a lesser included offense of another, they are "the same" within the meaning of the Double Jeopardy Clause of the Fifth Amendment. *Brown* v. *Ohio*, 432 U.S. 161 (1977). The felony charged as the predicate for a felony-murder is an element of it, and thus is a lesser included offense. *See Harris* v. *Oklahoma*, 433 U.S. 682 (1977). Consequently, the consecutive sentences imposed on the petitioner upon his conviction for felony-murder (rape) and for the underlying rape constituted double punishment in violation of his right not to be punished twice for the same offense.

Nor did Congress intend for the person convicted of felony-murder to be doubly punished. To begin with, it is at least as reasonable to believe, contrary to the view of the Court of Appeals, that the felony-murder rule includes in its zone of protection those interests also protected by the statute proscribing the particular underlying felony. More important, the relevant legislative history affirmatively demonstrates that Congress intended that the penalty for

first-degree murder—which even after the annulment of the death penalty provision remains by far the harshest to be found in the District of Columbia Code—would be the only penalty for the commission of a felony-murder. Thus, while petitioner would argue that, at the least, the Double Jeopardy Clause requires clear and convincing evidence that Congress intended double punishment before it could constitutionally be imposed, here such punishment is palpably in conflict with Congress' intent.

ARGUMENT

THE CUMULATIVE PUNISHMENT IMPOSED HERE FOR FELONY-MURDER (RAPE), AND FOR THE SAME RAPE THAT WAS CHARGED IN THE INDICTMENT AS THE PREDICATE FOR THAT FELONY-MURDER, WAS IMPROPER BECAUSE IT (i) CONSTITUTED IMPERMISSIBLE DOUBLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND (ii) WAS NOT AUTHORIZED BY CONGRESS.

I. The Consecutive Sentences Imposed On The Petitioner Subjected Him To Double Punishment In Violation Of His Fifth Amendment Right Not To Be Twice Put In Jeopardy For The Same Offense.

The petitioner argued in the District of Columbia Court of Appeals that the consecutive sentences imposed by the trial court for felony-murder rape (20 years to life) and for the underlying rape (15 years to life) constituted double punishment in violation of the Fifth Amendment guarantee against double jeopardy. In its opinion, the Court of Appeals all but ignored this argument, and instead concluded that because it found "nothing to suggest" that Congress intended a single punishment for these offenses, cumulative punishment was permissible. As we will show in Part II of this brief, that court's analysis with respect to Congressional intent was conceptually misguided and it ignored critical legislative history. As a result, its conclusion with respect to that intent was simply wrong. But even more fundamentally, the court was wrong even to consider the question of congressional intent given its conclusion that the rape charged was but an element—and hence a lesser included offense—of the felony-murder. Since, as we will show in Part I of this brief, the two offenses are in fact the same, and hence that cumulative punishment was unconstitutional, the issue of congressional intent need not have been reached at all.[1]

[1] Of course, if the Court of Appeals had concluded that cumulative punishment was not intended by Congress, it would not have had to consider whether the offenses were "the same" for constitutional purposes. Similarly, if this Court concludes that the Court of Appeals was wrong with respect to legislative intent, it would not have to reach the constitutional issue addressed in Part I. *See, e.g., Simpson* v. *United States*, 435 U.S. 121 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) Blackmum, J.). In his brief, petitioner does not enjoy the luxury of avoiding the constitutional issue; for it is conceivable that this Court will not agree with his analysis of congressional intent in Part II, *infra*.

The petitioner's argument that the consecutive sentences imposed here violated his right not to be punished twice for the same offense is both straight forward and compelling. It can best be stated in syllogistic form: When one offense is a lesser included offense of another, they are, for double jeopardy purposes, "the same" offense for which only one punishment can be imposed; the rape charged here in count 5 of the indictment is a lesser included offense of the felony-murder charged in count 1 of the indictment; therefore cumulative punishment for felony-murder (rape) and the underlying rape constitutes impermissible double punishment for the same rape offense.

While the Court of Appeals erroneously failed even to address this argument, in its Response to the Petition for a Writ of Certiorari, the government first questions each of these premises, and then contends that even if they are correct, the conclusion of unconstitutionality which would seem to flow inexorably from them, should nevertheless be rejected. We will discuss each of these premises, and the government's counter to them, in turn.

A. When One Offense Is A Lesser Included Offense of Another, They Are The Same Offense Under The Fifth Amendment.

As this Court said in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Fifth Amendment guarantee against double jeopardy

> . . . protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *Id.* at 717.

Consequently, in the context of both multiple trials and multiple punishment, it is always essential, but not always easy, to determine whether the alleged offenses were in fact the same.

Of these various tests formulated by the courts to effect this determination of "sameness," the so-called "*Blockburger*" test, has now gained clear ascendency. *See Blockburger* v. *United States*, 284 U.S. 299 (1932). That test provides, in essence, that if each offense charged requires proof of an element that the other does not, the offenses are distinct. But, conversely, if each offense does not contain an element that the other does not, then they are not "sufficiently distinguishable to permit the imposition of cumulative punishment. . . ." *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). While, as the government points out, this test may have been articulated in *Blockburger* itself "as a means of identifying congressional intent," (Response, p. 7) its venerable precursors were clearly constitutionally based, *See, e.g., In re Neilson*, 131 U.S. 176 (1889). More to the point, it has, in recent times, been explicitly and consistently utilized by this Court as a constitutional test:

> The *Blockburger* test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately defined crimes constituted the "same offense; for double

jeopardy purposes." *Simpson* v. *United States*, 435 U.S. 6, 11 (1978).

See also Brown, supra, at 166. While *Blockburger* may be but a threshold test with respect to successive trials,[1] it is now the constitutional test with respect to cumulative punsihment:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States.*" *Brown* v. *Ohio*, 432 U.S. at 166.

Under this test, then, it would seem that the paradigmatic case of "same offenses" for which cumulative punishment could not be imposed would be that of the greater offense and its lesser included offenses; for by definition a lesser included offense contains no element not contained in the greater. And, indeed, this principle, acknowledged by this Court at least 90 years ago in *In re Neilson, supra*, at 188, was explicitly reaffirmed in *Brown* v. *Ohio*, 432 U.S. at 168:

> As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater. . . . The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.

[1] While the *Blockburger* test establishes the necessary conditions for cumulative punishment, successive trials may be barred in some circumstances even where offenses are different under *Blockburger*. *See Brown, supra*, 432 U.S. at 166-67, n.6.

See also Harris v. *Oklahoma*, 433 U.S. 682 (1977).

It would seem to be beyond cavil, then, that since an offense and its lesser included offense are the same for Fifth Amendment purposes, consecutive punishment for each violates the double jeopardy guarantee against multiple punishment.

In its Response the government blithely characterizes the statements in *Brown* with respect to cumulative punishment as dictum, presumably because *Brown* involved punishments imposed for lesser and greater offenses at successive trials. Response, p.8. But the Court in *Brown* clearly perceived the question of cumulative punishment as squarely before it. In fact, the Court in *Brown* reached its conclusion as to separate punishments imposed at successive trials by arguing from the illegality of such punishments imposed at a single trial:

> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. 432 U.S. at 166.

Consequently its statement with respect to the unconstitutionality of separate punishments for a greater and lesser included offense imposed at a single trial is not merely dictum.

Moreover, the "openness" of the question of the constitutionality of cumulative punishments for a greater and a lesser included offense is illusory. The

uncertainty is alleged to flow from the plurality opinion in *Jeffers* v. *United States*, 432 U.S. 137 (1977), which, the government points out, was decided the same day as *Brown*, and concurred in by *Brown's* author. In *Jeffers*, the government contends, the plurality deemed it "unnecessary to reach the lesser included offense [punishment] issue" because it concluded that Congress did not intend to permit multiple punishment for the offense at issue there. This is true but irrelevant. For a careful reading of *Jeffers* reveals that the "lesser included offense" issue which the Court felt it was "unnecessary to reach" was not, as the government implies, the question of whether consecutive punishment could be imposed for a greater and lesser included offense. Rather, the unreached issue was whether the offenses charged in *Jeffers*, 21 U.S.C. §848 and 21 U.S.C. §846, did in fact stand in a greater and lesser included offense relationship to one another.[3] There is, then, no reason whatever to doubt that the author of *Brown*, writing for the Court, meant just what was said there: that a greater and

[3] What the court said is that its conclusion with respect to congressional intent "*again* makes it unnecessary to reach the lesser included offense issue." (emphasis added). 432 U.S. at 155. And the issue that the Court had earlier grappled with, and found it unnecessary to decide, was that of whether §846 was a lesser included offense of §848. This turned on the highly technical question of whether acting "in concert" necessarily presupposed a conspiracy. *Id.* at 149-151, and 152, n.20: ". . . it was by no means settled law that §846 was a lesser included offense of §848 . . . Even now, it has not been necessary to settle that issue definitively." This, then, is clearly the issue that the plurality referred to as "*again* unnecessary to reach."

lesser included offense are the same for double jeopardy purposes, and that cumulative punishment for such offenses is unconstitutional.

B. The Rape (Count 5) That Constituted The Predicate For Conviction of Felony Murder-Rape (Count 1) Was A Lesser Included Offense of It.

The petitioner was charged in count 5 with rape, and in count 1 with felony murder premised on that same rape. Consequently the jury could not convict on count 1 unless it found that the petitioner committed the underlying felony. The rape, then, was a lesser included offense—an element—of the greater offense, felony murder: ". . . it seems to us very clear that where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *In re Nielson*, 131 U.S. at 188.

This general principle was recently applied by this Court to the precise question at issue here: whether an underlying felony is a lesser included offense of a felony-murder premised on it. *Harris* v. *Oklahoma*, *supra*. In *Harris*, the Court unanimously ruled that the felony predicate (there, robbery by firearms), for a felony murder charge, is a lesser included offense of that murder charge. *See also State* v. *Cooper*, 13 N.J. 361 (1833) cited with approval in *Brown*, *supra*, at

168, and cases cited in the Petition for Writ of Certiorari in the present case at p.11. The United States Court of Appeals for District of Columbia Circuit has also ruled that the felony is a lesser included offense. *Green* v. *United States*, 489 F.2d 1145, 1158 (D.C. Cir. 1973), *cert. denied* 419 U.S. 977 (1974). Indeed, the court below here acknowledged that the "underlying felony is an element of felony murder." Nevertheless it went on to assert that it was not a lesser included offense of felony murder because different "societal interests are served by each statute," and because "[w]e find nothing in the legislation to suggest that Congress intended the underlying offense to be nonprosecutable under the merger rule . . ." 379 A.2d at 1159.[4]

[4] Although the Court of Appeals acknowledged that "the underlying felony is an element of felony murder," it attempted to avoid the double jeopardy consequences of this fact by then characterizing the felony as "an intent-divining mechanism." 379 A.2d at 1160. The underlying felony, wrote the Court, "permits the jury to infer the requisite intent" that would otherwise require more direct proof. *Id.* at 1159. Although the Court was thus using the language of permissive inferences, it is clear that this has never been the function of the underlying felony and it is equally clear that the court was not attempting to re-define the elements of felony-murder, which has, of course, never required proof of actual intent. Under the nonpurposeful felony murder provision contained in 22 D.C. Code §2401, as with most felony murder statutes, the felony is proved not as a means of proving the defendant's actual state of mind. Rather, it relieves the state of the burden of proving that state of mind. Its effect, therefore, is to render actual state of mind irrelevant. The defendant may not escape punishment for first degree murder even if he can affirmatively show that he lacked the mental element—

As we show in Part II, the Court's approach was misguided, and its conclusions simply wrong. Not surprisingly, the government, in its Response does not rely heavily on the lower court's opinion; indeed, it scarcely mentions it. Rather, the government suggests, rape is not a lesser included offense of felony murder because, viewed in the abstract, felony murder does not require proof of carnal knowledge, as rape does. It argues that because the underlying felony for felony-murder can be one of several enumerated felonies, the felony-murder statute itself does not require

premeditation and malice—otherwise necessary for first degree murder. Indeed, it is first degree murder even if the killing was accidental. *E.g.*, *Mumforde* v. *United States*, 130 F.2d 411, 413 (D.C. Cir.), *cert. denied*, 317 U.S. 656 (1942).

The Court below did not depart from that long-standing rule but was merely endeavoring to explain the decision it had reached by means of a legal fiction. This is clear, for shortly after the opinion in *Whalen*, another panel of the Court of Appeals recognized that, in a felony-murder prosecution, "proof of the felony *substitutes for* premeditation and deliberation by legislative fiat." *Pynes* v. *United States*, 385 A.2d 772, 773 (D.C. Ct. App. 1978) (emphasis supplied).

Indeed, elsewhere in its opinion in the present case, the Court of Appeals treated the underlying felony as a lesser included offense of felony-murder, when it held that reversal of petitioner's burglary conviction necessitated reversal of his conviction for felony-murder (burglary) as well. The Court of Appeals, then, like the Ohio Supreme Court in *Brown*, *supra*, in effect found that the underlying felony is a lesser included offense of felony-murder, but, again like the Ohio court in *Brown*, nonetheless permitted cumulative punishment. 379 A.2d at 1157 n.2.

proof of any specific felony. The government puts it this way:

> Whether our view or that of the petitioner is correct depends upon whether all lesser included offenses are *ipso facto* the "same" as the greater offense under the *Blockburger* test, regardless of identity of elements, or whether only necessarily included offenses are the "same." (Response, p.9). (Emphasis in original).

A more accurate way to put it, however, would be to ask whether two offenses are "the same" when the *indictment* itself demonstrates that proof of one offense charged will necessarily involve proof of the other, or whether they are the same only if proof of violation of one *statute*, viewed in the abstract, would necessarily require proof of another.

As with its contention with respect to the "sameness" of lesser included offenses generally, the government here too seems to be maintaining at best a rear guard action in the face of clearly controlling precedent. *See Harris* v. *Oklahoma*, *supra*. But, undaunted, it suggests that this Court re-examine its unanimous holding of two terms ago in *Harris*, *supra*, and then, as with its approach to *Brown*, seeks to distinguish *Harris* as involving successive trials, not cumulative punishment imposed at a single trial. But while this Court has recognized the disparate interests protected by the double jeopardy guarantee, it has, wisely, never introduced still further complexity to an already difficult area of the law by defining the

single constitutional phrase "same offense" differently with respect to each of the interests which the clause protects. And it has not applied *Blockburger* as requiring that two offenses be identical in law and fact to be the same for purposes of the Fifth Amendment.[8] As the Court said in *Brown:*

> It has long been understood that separate statutory crimes need not be indentical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition. 432 U.S. at 164.

Moreover, the government's sophistic approach—viewing the statutes involved in the abstract, not the offenses actually charged in the indictment—does not, as the government maintains, "clearly produce more sensible results in cases like this." Indeed, it would produce utterly absurd results. For example, suppose the defendant is charged with a first or second degree murder by shooting. Surely all would agree that an assault with intent to kill immediately preceeding the pulling of the trigger is quintessentially a necessarily lesser included offense of the murder for which cumulative punishment could not be imposed. But on the government's theory, it would not be a *necessarily*

---

[8] It is true that overlapping proof at trial will not necessarily make two offenses "the same." *See, e.g., Blockburger, supra.* But where, as here, the indictment itself demonstrates that proof of one offense will necessarily (not just coincidentally) require proof of the other, this Court has treated them as the same. *See, e.g., Jeffers* v. *United States*, 432 U.S. 137 (1977) (Blackman, J.), discussed *infra.*

included offense. In the District of Columbia, to kill another by poisoning is, not surprisingly, murder. Such a murder would not, however, involve an actual assault. *See* 22 D.C. Code §501. Hence it is possible to commit a murder without an assault with intent to kill. And, of course, it is possible to commit an assault with intent to kill without actually killing anyone. On the government's theory this would mean that assault with intent to kill is never a necessarily included offense of murder, whatever the nature of the murder actually charged in the indictment. Such nonsensical results, and the cramped approach championed by the government which would produce them, have been rejected by this Court. For it is the *offense* charged in the indictment,[6] not the *statutes* viewed in the abstract, which this Court has treated as dispositive with respect to whether two offenses are the same.[7]

[6] This Court has recognized that "the manner in which an indictment is drawn cannot be ignored" because "an important function of the indictment" is to shield the accused from potential double jeopardy. *Sanabria* v. *United States*, 437 U.S. 54, 65-66 (1978), and cases cited therein. This is one of the reasons for requiring specificity in the indictment. *See, e.g., United States* v. *Tanner*, 471 F.2d 128, 139 (7th Cir.) *cert. denied* 409 U.S. 949 (1972); 8 Moore, *Federal Practice* ¶8.03[1]. Here, the indictment would have been insufficient if it had not specified the felony on which the government based its felony-murder count. *Cf. United States* v. *Seeger*, 445 F.2d 232 (D.C. Cir. 1971) (where burglary is charged, the offense which the accused intended to commit must be specifically alleged in the indictment.)

[7] The relevance to double jeopardy of the proof actually adduced at trial is a much brooded question. *See, e.g., Note*, 7 Balt. L. Rev. 345 (1978), which discusses the various tests which have been formulated by the courts to discern whether two offenses are the same. But certainly where, as here, the indictment itself demonstrates that one offense must necessarily be proved in proving the greater offense, the offenses should be considered the same for Fifth Amendment purposes.

This was clearly so in *Harris, supra*, and *Brown, supra*. It is also implicit in *Jeffers, supra*. In *Jeffers*, The Court had to decide whether 21 U.S.C. §846, which proscribes conspiracy to commit offenses defined in a particular subchapter of 21 U.S.C. §841, was a lesser included offense of 21 U.S.C. §848 which proscribes, in essence, managing a continuing criminal enterprise. Section 848 then goes on to define a person engaged in such an enterprise as one who violates any provision of either of two separate subchapters of 21 U.S.C. §841 in concert with at least five other people with respect to whom he occupies a supervisory position. Jeffers was charged with conspiracy under §846 and, in a separate indictment, with conducting a continuing criminal enterprise under §848. The conspiracy charged under §846 was, it appears from the indictments, to commit the same substantive offenses which were the predicates for the continuing criminal enterprise charge. *See* Joint Appendix, *Jeffers* v. *United States*, pp.3 and 6. Jeffers objected to consolidating the indictments, and was tried, and convicted, on each of them separately. Cumulative sentences were imposed.

Four dissenting justices felt that §846 clearly was a lesser included offense of §848 for which the defendant could neither be successively tried nor cumula-

tively punished. 432 U.S. at 158. In his opinion for the four judge plurality, Justice Blackum dealt at some length with the issue of whether §846 was a lesser included offense of §848. In doing so, he alluded to the fact that "the two indictments in this case are remarkably similar in detail. It is clear that the identical agreement and transactions over the identical time period were involved in the two cases." *Id.*, at 150 n.16. As the plurality saw it, the lesser included offense issue turned on whether the "in concert" requirement of §848 presupposed a conspiracy. Assuming (without deciding) that it did, the Court concluded that §846 is a lesser included offense of §848:

> So construed, §846 is a lesser included offense of §848, because 848 [construed as requiring a conspiracy] requires proof of every fact necessary to show a violation under §846 as well as proof of additional elements. *Id.*, at 150.

Nevertheless, the Court did not have to decide definitively the question of whether §848 did presuppose of conspiracy because it concluded, with respect to successive trials, that Jeffers had waived his double jeopardy right, and, with respect to consecutive fines, that they were impermissible because Congress did not intend cumulative punishment.[8]

For the dissenters, then, it was clear that §846 was a lesser included offense of §848, while for the plural-

[8] Because Jeffers was sentenced to life in prison without possibility of parole on the §848 conviction, it was only the consecutive fines that had any practical significance.

ity this was a difficult issue which it found it unnecessary to decide. But on the government's theory, the case should not have been hard at all, the issue should not have been the meaning of "in concert", and the Court should have been utterly indifferent to the indictments. For on the government's approach, §846 plainly is not a lesser included offense of §848 because, as with felony murder, any one of a range of predicate offenses *could have been* charged to establish the §848 violation. These offenses *could have been* different from those the defendant was alleged to have conspired to commit under §846. Indeed, they *could have been* from a subchapter to which §846 did not even apply. On the government's wistful theory, it is what might have been, not what is, that is determinative. Thus it should have been completely irrelevant to the Court that the same offenses were *in fact* named in the conspiracy charge and as predicates for the §848 charge, for they could have been different.[9]

But, clearly, the indictment was not irrelevant to either the dissenters or the plurality in *Jeffers*. Indeed, on the assumption that "in concert" presup-

[9] In its brief in *Jeffers*, the government's argument was similar to, but more restrained than, its suggestion here. There it maintained only that §846 was not a lesser included offense of §848 because the actual predicate offenses charged in the §848 count were not conpiracies. Indeed, it even intimated that the offenses actually charged as predicates would be lesser included offenses. *See* Brief for the United States, *Jeffers* v. *United States*, p.31. Here, of course, the issue is whether the rape actually charged and relied on as the felony murder predicate, is a lesser included offense of it.

posed conspiracy, it was dispositive. In the present case, no assumptions are necessary, for the offenses charged here do not involve subtle words of art, and the indictment plainly established the lesser included offense relationship between the rape charged in count 5 and the felony-murder charged in count 1 which is predicated on that same rape.

C. Because The Rape And Felony-Murder Predicated On It Are The Same Offense, The Cumulative Punishment Imposed Was Unconstitutional.

As petitioner has shown, a greater and lesser included offense are the same for purposes of the Fifth Amendment. Petitioner has also shown that the rape of which he was convicted here was a lesser included offense of the felony murder for which proof of the same rape was an indispensable element. Nevertheless, the government suggests, the Court should reject the apparently ineluctable conclusion that the consecutive punishments imposed here were unconstitutional. Instead, this Court should hold that the propriety of consecutive punishments, even for the same offense, turns exclusively on legislative intent. If the legislature wants the court to punish twice for the same offense, then the courts must do so, because, the government argues, the legislature could accomplish equivalent results through its virtually unlimited power to fix sentences and to provide for enhanced punishments where specified factors are present. Response, p.10.

This startling proposal, which asks the Court to ignore the plain language of the Constitution and over a hundred years of precedent, has nothing to commend it, and should be rejected. To begin with, even if the legislature can accomplish a given result in a certain way, it does not follow that it is therefore constitutionally free to accomplish an equivalent result in a different way, particularly where, as here, these differences implicate the judicial process. *Cf. Mullaney* v. *Wilbur*, 421 U.S. 624 (1974); *Patterson* v. *New York*, 432 U.S. 197 (1977); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). And here, there is an important symbolic, if not consequential, difference between punishing a person twice for the same offense, and punishing him once—albeit more severely—for that offense. While the legislature is generally free to authorize the judiciary to do the latter, it cannot require the courts to do the former.[10] For, as this Court has recognized, it is simply unfair to punish twice for the

[10] Conceivably, a legislative scheme which appeared to authorize cumulative punishment for a "greater" and lesser included offense as defined under the *Blockburger* test, would, upon examination of the legislative history and relative length of the sentences authorized, be so closely akin to traditional enhancement provisions that it could be said not to entail double punishment. *See, e.g.*, 18 U.S.C. §924(c) where the "greater" offense carries a shorter term than the vast bulk of the predicate felonies which may underlie it.

same offense, irrespective of the penalty actually imposed:[11]

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offenses as from being twice tried for it. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) quoting *Ex Parte Lange*, 18 Wall. 163, 168 and 173 (1874).

Moreover, the government's argument here is really no more than a radical variant of its argument that "same offense" for purposes of cumulative punishment should be defined differently than "same offense" for purposes of successive trials: that, in fact, "same offense" for cumulative punishment purposes means, effectively, whatever the legislature says it should mean. This suggestion is at odds both with the plain language of the Fifth Amendment and with a substantial body of controlling case law. Indeed, if the government were correct in its contention that legislative intent is all there is, this Court has squandered a good deal of time and effort seeking sometimes to elucidate, and other times to avoid, a constitutional chimera.

---

[11] This is so even where, as in *Pearce*, the aggragated "double punishment" was still less than the single maximum sentence that could have been imposed. *See Pearce* v. *North Carolina*, *supra*, 395 U.S. at 719 n.14

For example, in *Simpson* v. *United States*, *supra*, eight justices of this Court felt that there really was a constitutional issue separate and apart from that of whether Congress intended to permit consecutive punishments under 18 U.S.C. §2113(d) (bank robbery with the use of a dangerous weapon or device) and 18 U.S.C. §924(c) (using, or unlawfully carrying a gun in the commisson of a federal felony); for it was to avoid "constitutional decisions where possible," 435 U.S. at 12, that the Court turned to a consideration of congressional intent. If the government is correct, the Court was seeking to avoid a constitutional issue that cannot possibly exist.

Similarly, if the government's analysis is valid, the plurality opinion in *Jeffers*, *supra*,—not to mention the dissent—becomes a hopeless muddle. Indeed, the Court of Appeals in *Jeffers* had read this Court's recent decision in *Iannelli* v. *United States*, 420 U.S. 770 (1975), as establishing "a new double jeopardy approach towards complex statutory crimes"; an approach which focused exclusively on congressional intent. 532 F.2d 1101, 1108 (1976). In other words, the Court of Appeals read *Iannelli* as establishing an approach which was, in fact, identical to that which the government now suggests be applied across the board. But the *Jeffers* plurality unequivocably rejected this interpretation of *Iannelli;* "contrary to the suggestion of the Court of Appeals, *Iannelli* created no exception to these general jeopardy principles for complex statutory crimes." *Id.* at 151. Plainly, the

"general jeopardy principles" referred to, relate to the Constitutional determination of "sameness", and are not synonymous with the determination of congressional intent. As the plurality said later in the course of its opinion, in addressing the cumulative punishment issue:

> If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely in order to avoid constitutional multiple punishment difficulties. *Id.* at 155.

But, as with *Simpson, supra*, if the government's position were correct, such constitutional difficulties could not conceivably exist with respect to the issue of multiple punishment.

That position has been consistently rejected by this Court. Its inadequacies are palpable. Indeed, the opinion of the lower court here vividly manifests its deficiencies and dangers. It should be unequivocably rejected again, and the petitioner's cumulative sentences set aside as violative of his rights under the Fifth Amendment.

II. The Court Of Appeals Impermissibly Sanctioned Double Punishment That Was Never Contemplated By Congress.

As we have shown in Part I of this Brief, the two offenses at issue are constitutionally "the same." But had the lower court properly analyzed the issue of

legislative intent, it would not even have had to reach the constitutional issue, for it would have found that Congress had not authorized double pubishment. *See, e.g., Simpson* v. *United States, supra*, where the Court was able to avoid decision on the constitutionality of double punishment under the congressional enactments involved there, when it found insufficient reason to believe that Congress intended consecutive sentencing. Instead the Court of Appeals seems to have conflated the statutory and constitutional issues, reasoning that because, in its view, separate societal interests were served by the rape and the felony murder statutes, cumulative punishment was permissible. It then seems to have used this conclusion to assume away the constitutional issue.

By doing so, the Court of Appeals elevated societal interest analysis to an unduly exalted position. But on its own terms, its analysis of the interests involved was deficient. The court found that when Congress prohibited rape and when it prohibited felony-murder, two distinct interests were at stake: protection against sexual assaults and protection of human life. 379 A.2d at 1159-60. Apparently as a variation on the same theme, the court stated that finding merger between felony-murder and the underlying felony would mean adopting a "construction of law the effect of which would be to render the underlying felony a nullity any time death occurred during its perpetration." 379 A.2d at 1160. This argument assumes what it sets out to prove. In addition, it loses sight of the

narrowness of the issue here, which is not the permissibility of cumulative punishment for a felony and a killing committed during its commission, but only such cumulative punishment where the homicide has been charged and proved as a felony-murder rather than some other form of criminal homicide.

In the first place, although the court was clearly correct that the felony-murder statute protects the societal interest in human life, it was wrong simply to assume that when felony-murder (rape) is charged, the felony-murder statute does not also implicate the societal interests served by the rape statute. For it is at least as plausible to believe, contrary to the view of the Court of Appeals, that the felony-murder rule is intended to embrace the interests protected by the underlying felony, just as it embraces all of the elements of that lesser offense, together with some further elements.[12] Indeed, felony-murder rule is usually

[12] Indeed, elsewhere in its opinion, the Court of Appeals expressly made this very point. It construed two precedents of its own, *Blango* v. *United States*, 373 A.2d 885 (D.C. Ct.App.1977) and *Harris* v. *United States*, 377 A.2d 34 (D.C. Ct. App. 1977), as permitting "separate convictions for first-degree premeditated murder and felony murder (burglary)," both based on the same killing. 379 A.2d at 1159. These separate homicide convictions were permissible, said the court in *Whalen*, because "the societal interests served by each statute [premeditated murder and felony murder] are separate and distinct." 379 A.2d at 1159, citing *Blango*, *supra*, 373 A.2d at 888. The *Whalen* court identified these separate interests by looking to the underlying felony:

> " '[T]he societal interest served by the burglary statute, protection of occupied dwellings, is separate and distinct from that of the murder statute, security and value of the person.' " 379 A.2d at 1159, *citing Harris*, *supra*, 377 A.2d at 38.

explained as doing precisely that. The rule is conceived of as providing additional deterrence with respect to the underlying felony and, as well, as creating an incentive for those who will commit the felony despite these added sanctions to do so with such care as to avoid even an accidental killing. *See, e.g.*, G. Fletcher, *Rethinking Criminal Law*, §4.45, at 298 (1978). And, although the legislative history of the 1940 enactment[13] that created the non-purposeful felony-murder provision here at issue is silent concerning the rationale that Congress accepted,[14] under the analysis of an influential contemporary explanation of homicide law, a felony-murder law would necessarily embrace the interests protected by the underlying felony. *See* Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701 (1937). Wechsler and Michael argued that in cases when an unforeseeable killing occurs in the course of a felony—i.e., when the homicide may not be prosecutable except as felony-murder—the rule does not "make criminal any behavior that would not otherwise be criminal." *Id.*, at 745 n.161. In such a case, there is nothing to distinguish the felony-murder from the ordinary felony except the accidental consequences of identical

Thus, the Court of Appeals in *Whalen* read these two prior decisions as construing the felony-murder provision in issue here to serve the interests protected by the underlying felony.

[13] Act of June 12, 1940, Pub. L. No. 76-607, 54 Stat. 347.

[14] *See* S. Rep. No. 55 on S. 186, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 28 on H.R. 1807, 76th Cong., 1st Sess. (1939).

conduct. The felony-murder rule then functions to permit harsher punishment for the felon who has caused a death, *Id.*, but, under this theory, that punishment would necessarily embrace punishment for the felonious conduct, as well as for the unintended consequence of that conduct, because the conduct punished as the felony and the conduct punished as felony-murder are the same.

Furthermore, acceptance of the petitioner's argument clearly does not result in "nullifying" the underlying felony whenever someone is killed in its commission. But when that killing is charged, proved, and punished as felony-murder, the felony-murder punishment can itself be fairly seen as embracing punishment for the underlying felony.[15] And, of course, the underlying felony is hardly ignored, for it serves to elevate to first degree murder, carrying a mandatory sentence of 20 years to life, a killing which, if judged by the killer's actual intent, might be merely second degree murder, manslaughter or even non-criminal homicide, none of which in the District of Columbia carries a mandatory sentence of even remotely comparable severity. *See, e.g., Goodall* v. *United States,*

[15] Petitioner did not challenge below, nor does he challenge here, the propriety of consecutive punishment for a felony and a killing committed during its perpetration, when the defendant has been proved guilty of homicide on some theory other than that of felony-murder. Petitioner here was indicted, in a separate count, with second degree murder, and convicted. Petitioner does not thallenge the propriety of consecutive sentences for rape and a separately charged second degree murder.

180 F.2d 397, 399 (D.C. Cir.), *cert. denied,* 339 U.S. 987 (1950). In addition, the felony-murder statute has been held to imply a rule of vicarious liability, so that any participant in the underlying felony may be convicted of first degree murder, even where he is otherwise wholly uninvolved in the killing. *See, e.g., United States* v. *Carter,* 445 F.2d 669, 672 & n.8 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 932 (1972). It is impossible to understand these rules, except as a form of aggravated punishment for the felony itself, when aggravating consequences occur.[16]

In petitioner's view, then, the Court of Appeals analysis of the interests served was too simplistic. But, at all events, that Court was mistaken in letting its conclusion with respect to congressional intent hinge exclusively on the outcome of this mode of analysis. For the purposes and and explanations of the felony-murder rule are myriad and complex. Analysis of it has shifted over the years. It is plainly too frail a reed to support the conclusion that Congress intended double punishment for for an offense and a necessarily included lesser offense.[17] At a minimum,

[16] On this view the felony-murder rule is justified because the commission of certain felonies is deemed inherently dangerous. If, then, a killing occurs in the course of the felony—even though the killing was completely unintended—all those participating in the felony may be deemed culpable with respect to the murder. But their culpability stems from their participation in the felony. *Cf.* R. Perkins, *Criminal Law,* 40-41 (2d ed. 1969).

[17] To be sure, the societal interest analysis employed by the Court of Appeals might be useful in solving other sorts of problems. It might be a useful mode of analysis for deciding whether

the double jeopardy clause requires a clear and convincing showing that the legislature intended double punishment before the courts may inflict such a presumptively impermissible penalty.[18] For if the court is

a single course of conduct violating the literal terms of two separate statutes can give rise to two separate convictions, when one offense is not necessarily included in the other. In such a situation, the Court of Appeals has looked to whether the defendant's actual conduct was such as to jeopardize independently, or just incidentally, the interests sought to be protected under each statute. *See Robinson* v. *United States*, 388 A.2d 1210, 1211-13 (D.C. Ct. App. 1978) (rape and kidnapping).

But, as petitioner shows in Part I of his brief, the outcome of such analysis is irrelevant when, as here, the two offenses are but one in the *Blockburger* sense. The Double Jeopardy Clause and the precedents of this Court interpreting it, prohibit double punishment, whatever societal interests the statutes might be deemed to serve. Moreover, as petitioner argues in Part II, the Court of Appeals' misplaced reliance on such analysis here led it to embrace a position that double punishment could be imposed in palpable conflict with the actual congressional intent.

[18] That the evidence that Congress intended cumulative punishment must be compelling is a corollary of the rule of lenity, which, at least when a potential double jeopardy violation exists, is itself grounded in the Constitution. *See Note*, Twice in Jeopardy, 75 Yale L.J. 262, 316 (1965):

> The rule of lenity is not a casual presumption about legislative intent, but a constitutionally compelled canon of construction. It requires the legislature to specify clearly when overlapping statutes are to allow cumulative sentences. It forbids courts to proliferate sentences out of legislative silence. The rule of lenity is designed to prevent multiple judicial punishment for a single legislative offense—to preclude substantive double jeopardy.

Cf. Simpson v. *United States*, 435 U.S. 6, 14-15 (1978); *Ladner* v. *United States*, 358 U.S. 169, 177-78 (1957); *Prince* v. *United States*, 352 U.S. 322, 329 (1957); *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

wrong in its conclusion that consecutive punishment was intended, the defendant's double jeopardy rights are violated. Had the Court of Appeals looked to legislative history, it would have discovered that the evidence that might have supported a conclusion that Congress intended such double punishment simply does not exist. On the contrary, that history shows that Congress contemplated that there would not be successive punishment for felony-murder and the underlying felony.

The non-purposeful felony-murder provision under which petitioner was convicted was enacted in 1940 as an amendment to the original 1901 District of Columbia Code. *See* Act of June 12, 1940, Pub. L. No. 76-607, 54 Stat. 347. This amendment came in response to judicial decisions interpreting the other felony-murder provision in the first degree murder statute,[19] which punishes as first degree murder killings occurring in the course of "any offense punishable by imprisonment in the penitentiary." Those decisions had restricted the provision's application to purposeful killings. *See* S. Rep. No. 55 on S. 186, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 28 on H.R. 1807, 76th Cong., 1st Sess. (1939). At the time of this enactment, however, a person convicted of first degree murder faced a mandatory death penalty. Act of March 3, 1901, ch. 854, §801, 31 Stat. 1321, *as amended by* Act

[19] *See Jordon* v. *United States*, 87 F.2d 64, 66 (D.C. Cir. 1936); *Marcus* v. *United States*, 86 F.2d 854, 859-60 (D.C. Cir. 1936).

of Jan. 30, 1925, ch. 115, §1, 43 Stat. 798. It is therefore clear that Congress envisaged no cumulative punishment for felony-murder and the underlying felony.

Nor is there any reason to think that when Congress enacted the statute that presently sets forth the penalty for first degree murder, it intended such cumulative punishment. In 1962, Congress repealed the mandatory death penalty provision for first degree murder and enacted a new provision that permitted imposition either of the death penalty or of life imprisonment. Act of March 22, 1962, Pub. L. No. 87-423, §1, 76 Stat. 46, *codified at* 22 D.C. Code §2404 (1973).[20] With respect to the life sentence thus authorized, Congress provided:

> Nothwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence. *Id.*

Neither the House nor the Senate committee report on this legislation suggests that Congress intended to permit this mandatory sentence of from 20 years to life—by far the harshest sentence set forth anywhere

[20] The death penalty provisions have since been held to conflict with *Furman* v. *Georgia*, 408 U.S. 238 (1972), *see United States* v. *Stokes*, 365 A.2d 615, 616 n.4 (D.C. Ct. App. 1976), and as a result the punishment for first degree murder is a mandatory sentence of from twenty years to life.

in the District of Columbia Code—to run consecutively to the sentence for the underlying felony, when the conviction was for felony-murder. *See* S. Rep. No. 373 on S. 1380, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 677 on H.R. 5143, 87th Cong., 1st Sess. (1961).[21]

Moreover, the extensive debate on this bill that occurred on the floor of the Senate makes clear that no one in the Senate[22] thought that this was a measure that would, for the first time, permit double punishment for felony-murder and the underlying felony. Just the opposite. The debate manifests a common assumption that the person convicted of felony-murder would be subject to the same penalty as the person convicted of premeditated murder, and to that

[21] Both reports state that the mandatory minimum sentence of 20 years for first degree murder was intended "to distinguish between the penalty for first degree murder and the penalty for second degree murder," for which a maximum sentence of from 15 years to life was authorized. S. Rep. No. 373, *supra*, at 2; H.R. Rep. No. 677, *supra*, at 2.

If Congress had intended to authorize consecutive punishment for felony-murder and the underlying felony, it would have been unnecessary to "distinguish" *such* first degree murders from second degree murders, even if the sentence for first degree murder were only from 15 years to life, because a conviction for felony-murder necessarily implies a conviction for the underlying felony. Thus, a convicted felony-murderer would always be subject to steeper penalties than a convicted second degree murderer, even if the sentences for the homicides themselves were identical.

[22] Comparatively little debate occurred on the House side, but nothing there indicates that one convicted of felony murder might be sentenced to a longer term than from 20 years to life. *See, e.g.*, 107 Cong. Rec. 12154 (1961) (remarks of Rep. Abernathy).

penalty only. Thus, Sen. Hartke, a sponsor of the legislation and, as chairman of the Committee on the District of Columbia, its chief spokesman on the floor, stated (108 Cong. Rec. 4128-29 (1962)):

> We must remember that the man who commits a felony, such as robbery or any other type of felony, and in the process of committing such felony also commits murder, kills an individual, or occasions his death, *is subject to the same provisons and penalties as if the act had been murder in the first instance.* [Emphasis supplied]

See also id. at 4131 ("The 20-year eligibility requirement affects all life sentences . . ."); *id.* at 4132 (". . . all persons sentenced to a life term shall serve 20 years of the term before being eligible for parole . . .").

There is, in fact, reason to think that Congress believed that persons convicted of felony-murder were less culpable, and thus deserving of less severe punishment than those found to have killed after actual premeditation.[23] Yet on the lower court's analysis, they are punished more harshly, for a sentence on the

[23] Sen. Keating, an active supporter of the bill, placed in the record a letter favoring the legislation, from David C. Acheson, the U.S. Attorney for the District of Columbia. That letter said (108 Cong. Rec. 3982 (1962)):

> A deliberate and premeditated poisoning . . . could plausibly call for a more severe punishment than a hasty felony murder such as the shooting of a gasoline station attendant in the course of a struggle by a first offender who was attempting to rob the establishment.

felony can be added to the 20 year to life felony-murder sentence.

The intended application of the new 20 year to life sentence is perhaps most clearly illustrated by the debate engendered by the proposed, but ultimately rejected amendment introduced by Sen. Morse. Under Morse's proposal, a third sentencing option would have been available following a first degree murder conviction. Instead of either death or life imprisonment, with parole eligibility after 20 years, the convicted murderer might be sentenced to life in prison without possibility of parole. This proposal sparked extensive debate. *Id.* at 4130-44. If anyone on the Senate floor had thought that a person convicted of felony-murder could be sentenced to a term of from 20 years to life, and then to a consecutive term on the underlying felony, surely this possibility would have been mentioned. For it would have shown that potential sentences under the original bill, at least for some felony-murders, were so substantial as to make Sen. Morse's proposal superfluous. To cite one pertinent example, the maximum allowable prison sentence for the crime of rape was, at the time, thirty years. *See* 22 D.C. Code §2801 (1961). Thus, if Congress had intended to allow cumulative punishment, a person convicted of felony-murder (rape) could be sentenced to a term of from 30 years to life, by any measure a substantially greater sentence than that for murder alone. *See* 24 D.C. Code §203(a) (1961). Yet no one made this point.

On the contrary, the Senate rejected Sen. Morse's proposal precisely because a 20 year term in prison was deemed long enough for a defendant convicted of a first degree murder to serve before becoming eligible for parole. Thus, Sen. Pastore remarked (108 Cong. Rec. at 4143):

> If he [the person convicted of first degree murder] is imprisoned for the rest of his life, under the law of the District of Columbia, after he shall have served 20 years, he can be considered for parole. That strikes me as being adequate.

Other senators, in endorsing the principle of parole eligibility after 20 years, warned that, at the time of sentencing, passions might run high. *Id.* at 4131 (remarks of Sen. Lausche); *id.* at 4135 (remarks of Sen. Keating). They therefore cautioned against tying the hands of the parole authority, when, after the passage of 20 years, events might be viewed differently, *see id.*, and when, at all events, new facts concerning the prisoner's health and his performance in prison might argue for parole. *See id.* at 4132-33 (remarks of Sen. Holland and Sen. Hartke); *id.* at 4134 (remarks of Sen. Holland). It seems inconceivable, then, that with such strong support in the Senate for the right to be considered for parole after 20 years, that body intended to authorize a punishment consecutive to the 20 year to life sentence for the felony murder for the underlying felony of which the defendant is necessarily also guilty.

Thus, while in petitioner's view it is dispositive that felony-murder and the underlying felony are the "same offense" under the *Blockburger* standard, the relevant legislative history merely buttresses the conclusion that consecutive punishment is impermissible. Although the petitioner would argue that the statutes here at issue should be construed with the rule of lenity in mind, and that no consecutive punishment should be allowed because there is no clear expression that this was Congress' intent, that result should obtain here even without applying that rule. For the legislative history here is not simply ambiguous. Rather, it affirmatively demonstrates that Congress intended no double punishment for felony-murder and the lesser included felony. Accordingly, the judgment of the Court below should be reversed.

CONCLUSION

The judgment of the District of Columbia Court of Appeals upholding consecutive sentences for felony-murder and the underlying felony should be reversed and the case remanded for resentencing.

Respectfully submitted,

/s/ SILAS J. WASSERSTROM
Silas J. Wasserstrom

/s/ WILLIAM J. MERTENS
William J. Mertens

/s/ W. GARY KOHLMAN
W. Gary Kohlman
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200
Counsel for Petitioner